

1 THOMAS A. COLTHURST (CABN 99493)
Attorney for the United States

2 KATHERINE L. WAWRZYNIAK (CABN 252751)
3 Acting Chief, Criminal Division

4 MICHAEL G. PITMAN (DCBN 484164)
Assistant United States Attorney
5 150 Almaden Boulevard, Suite 900
San Jose, CA 95113
6 Telephone: (408) 535-5040
Facsimile: (408) 535-5081
7 Email: michael.pitman@usdoj.gov

8 KRISTEN CLARKE
Assistant Attorney General

9 MARLA DUNCAN
Trial Attorney

10 SARAH HOWARD
Attorney Advisor
11 Criminal Section, Civil Rights Division
United States Department of Justice

12 Attorneys for United States of America

13 UNITED STATES DISTRICT COURT
14
15 NORTHERN DISTRICT OF CALIFORNIA
16
17 SAN JOSE DIVISION

18 UNITED STATES OF AMERICA,
19 Plaintiff,
20 v.
21 SCOTT SHAW,
22 Defendant.

Case No. 5:22-cr-00105-BLF

UNITED STATES' SUPPLEMENTAL
BRIEF REGARDING EVIDENCE OF
OTHER ACTS OF SEXUAL ASSAULT
PURSUANT TO FED. R. EVID. 413

23 The United States, by and through undersigned counsel, hereby respectfully submits the following
24 brief in support of its request to call witnesses pursuant to Fed. R. Evid. 413 at trial. In a Motion filed on
25 January 30, 2023 (Doc. 43), the United States requested permission to call as many as sixteen witnesses
26 pursuant to Rule 413. After reviewing briefing and hearing argument, the Court held that fifteen of the
27 proffered witnesses satisfied Rule 413. *See* Doc. 68 at page 14. However, the Court also noted that it
28 had made a ruling with respect to each witness in isolation, and that it was cognizant of the potential for

1 Rule 413 testimony to become prejudicially cumulative, and thus excludable under Fed. R. Evid. 403.
 2 *See* Doc. 68 at page 15. Accordingly, the Court held that at least four Rule 413 witnesses would be
 3 permitted to testify at trial, and reserved judgement with respect to additional witnesses. *See* Doc. 68 at
 4 page 17.

5 The United States has reduced the number of Rule 413 witnesses it seeks permission to call at
 6 trial from fifteen to eight, and respectfully submits the following brief to identify the four 413 witnesses
 7 it intends to call pursuant to the permission granted by the Court in its April 5th Order, and also to
 8 propose four additional Rule 413 witnesses, and to explain why testimony from the additional witnesses
 9 is necessary and appropriate. As discussed in more detail in the United States' Letter Brief, filed on
 10 March 31, 2023 (Doc. 66), the Court would be well within its discretion in allowing testimony from eight
 11 Rule 413 witnesses. Each of them will provide relevant, non-redundant testimony and will corroborate
 12 different components of the anticipated testimony of the charged victims. Thus, all eight of the
 13 government's proposed Rule 413 witnesses satisfy the key "necessity" factor in the Ninth Circuit's five-
 14 pronged admission standard, set forth in *United States v. LeMay*, 260 F.3d 1018, 1027-28 (9th Cir. 2001),
 15 and discussed in further detail in the government's previously-filed briefs and the Court's April 5th
 16 Order. *See* Doc. 68 at 17 ("The Court will be able to better make a Rule 403 determination if it knows
 17 specifically, for each witness, why the testimony is necessary – to corroborate which aspect of the
 18 testimony of the charged victims."); *see also* Doc. 43 (applying the *LeMay* factors to the government's
 19 proposed Rule 413 witnesses); and *United States v. Perrault*, 995 F.3d 748, 769-70 (10th Cir. 2021)
 20 (affirming district court's decision to allow testimony from seven Rule 414 witnesses in case involving
 21 one charged victim because "[e]ach witness's testimony buttressed weak or assailable evidence").

22 The government anticipates that Defendant may seek to convince the jury that his conduct was
 23 inadvertent, that his conduct was medically necessary, or that the female student-athletes exaggerated or
 24 overreacted to what they perceived as inappropriate touching. "A prior sexual assault admissible under
 25 Rule 413 'need not be identical to [the charged offense] to have substantial probative value.'" *United*
 26 *States v. Yarlott*, CR 20-60-BLG, 2020 WL 6393894, at *4 (D. Mont. Nov. 2, 2020) (quoting *United*
 27 *States v. Erramilli*, 788 F.3d 723, 729 (7th Cir. 2015)). Here, Defendant's sexual assaults of student-
 28 athletes all followed the same pattern of behavior from the beginning of his employ at San Jose State

1 University (“SJSU”) in 2006 until his resignation in 2020. They all involve Defendant’s exploitation of
2 his position as an athletic trainer to gain and maintain access to young women in need of medical
3 treatment, and to sexually assault them, with the statute of limitations being the only real distinction
4 between his charged and uncharged assaults. While the exact type of inappropriate touching varies
5 among the Rule 413 witnesses, as explained below, these distinctions do not negatively impact the
6 probative value of the Rule 413 witnesses’ testimony, and thus do not undermine their admissibility.

7 **I. THE CHARGED SEXUAL ASSAULTS**

8 **1. Victim One**

9 Count One charges Defendant with touching Victim One’s breast without her consent and without
10 a legitimate medical purpose. Victim One, a member of SJSU’s women’s water polo team, saw
11 Defendant for treatment of her left shoulder during the Fall of 2017. Defendant massaged the back of her
12 shoulder and neck and then moved his hand under her sports bra and touched her left breast and then her
13 right breast. Victim One assumed that as the head athletic trainer, Defendant knew what he was doing,
14 even though he gave her no warning and did not ask for her consent. When Victim One questioned his
15 actions, Defendant said he was using “pressure point therapy,” and that she needed the treatment because
16 she often hunched over.

17 **2. Victim Two**

18 Counts Two and Three charge Defendant with touching Victim Two’s breast and buttocks,
19 respectively and on different occasions, without her consent and without a legitimate medical purpose.
20 Victim Two, a member of SJSU’s women’s water polo team, was treated by Defendant multiple times.
21 While treating Victim Two for a right shoulder injury during the Fall of 2017, Defendant applied pressure
22 to both sides of her neck and worked his hands down to her chest, and then to her left side. Victim Two
23 told Defendant that her left shoulder did not hurt, but he said she had a pressure point there, and that he
24 needed to continue or her shoulder would never heal. Defendant then moved his hands into Victim
25 Two’s bra, touching her breast and nipple. He touched her breasts on multiple occasions, but only
26 touched her nipple one time. During the 2018-2019 school year, Victim Two sought treatment from
27 Defendant for back pain. Defendant put his hand down her shorts, making skin to skin contact with her
28 buttocks. When Victim Two reacted with surprise, Defendant told her that he touched her buttocks

1 because he could not reach her knee (as he had during previous sessions).

2 **3. Victim Three**

3 Count Four charges Defendant with touching Victim Three's breast without her consent and
4 without a legitimate purpose. Victim Three, a member of SJSU's women's water polo team, sought
5 treatment from Defendant for tendonitis in her shoulder in the Spring of 2019. Defendant pushed on her
6 shoulder and then moved his hand near her breast. Victim Three told Defendant there was no pain in her
7 breast area and explained the kinds of treatment her usual trainer performed. In response, Defendant used
8 technical terms to justify his actions, and dismissed Victim Three's concerns. Defendant assured her that
9 the muscles were connected and then put his hand on her breast.

10 **4. Victim Four**

11 Counts Five and Six charge Defendant with touching Victim Four's breast and buttocks,
12 respectively and on different occasions, without her consent and without a legitimate purpose. Victim
13 Four, a member of SJSU's women's soccer team, sought treatment from Defendant for back pain in 2019
14 and 2020. During a treatment session, Defendant asked Victim Four to stand and turn around away from
15 him. Without warning, Defendant reached around her to tuck the front of her shirt into the front of her
16 sports bra, touching both of her breasts. Defendant then instructed Victim Four to bend over. He put his
17 hands on her back, walking his thumbs downward, pressing on her vertebrae. When Defendant got to her
18 lower back, he cupped her buttocks through her pants. In early 2020, Victim Four sought Defendant's
19 assistance in placing "stim pads" on her lower back. When Defendant applied the pads to Victim Four,
20 he put his bare hands on her bare buttocks.

21 **II. UNCHARGED CONDUCT**

22 **1. VICTIM C**

23 Victim C was a student-athlete on SJSU's women's softball team. In the fall of 2009, Victim C
24 went to Defendant for treatment of a hematoma on her shin. During Defendant's supposed treatment of
25 Victim C, he rubbed her thigh underneath her shorts. During a subsequent visit to the training room,
26 Victim C told Defendant that she had pulled a hamstring. Defendant said he could stretch it out, and told
27 Victim C to lay down on her back on the floor mat. Victim C laid on the ground, and raised her injured
28 leg vertically, expecting Defendant to stand in front of her and push her leg back towards her head.

1 Instead, Defendant got down on one knee, positioned himself groin to groin with her, and began
2 stretching her leg. Defendant was wearing thin shorts, and as he stretched her, his genitals were touching
3 Victim C's, and she could feel Defendant's penis getting erect. Victim C then stopped Defendant, and
4 left the training room. Victim C later told her coach that she would no longer go to the training room for
5 treatment, but her coach did not ask why. Victim C's testimony will corroborate anticipated testimony
6 from Victim Three regarding her refusal to return to receive treatment from Defendant or other trainers
7 after being assaulted, even though her injury had not yet completely healed.

8 The Court has already determined that Victim C's testimony is admissible pursuant to Rule 413,
9 *see* Doc. 68 at page 14, and the United States currently expects to call Victim C as one of the four Rule
10 413 witnesses the Court has pre-authorized under Rule 403. *See* Doc. 68 at page 17.

11 **2. VICTIM A**

12 Victim A was a student-athlete on SJSU's women's volleyball team. In the fall of 2008, Victim
13 A went to Defendant for treatment of a shoulder injury. Defendant told Victim A to lie down face-up on
14 a massage table and pulled Victim A's arm above her head and stretched, seeming to work on her
15 shoulder. He then moved his hand along the side of her breast, and then onto her breast itself. When she
16 questioned him, he dismissed her concern, condescending to her for questioning his methods – testimony
17 which will corroborate anticipated testimony from Victims Two and Three as to Defendant's response
18 when they expressed concern or surprise over his treatment methods. Victim A ended the treatment and
19 got off the table. She then went to volleyball practice where she announced that Defendant had touched
20 her inappropriately. Victim A never went back to Defendant for treatment and sought to avoid him
21 whenever possible.

22 The Court has already determined that Victim A's testimony is admissible pursuant to Rule 413,
23 *see* Doc. 68 at page 14, and the United States currently expects to call Victim A as one of the four Rule
24 413 witnesses the Court has pre-authorized under Rule 403. *See* Doc. 68 at page 17.

25 **3. VICTIM I**

26 Victim I was a student-athlete on SJSU's women's swim team. During the Fall/Winter of 2008-
27 2009, Victim I went to Defendant for treatment for shoulder and knee injuries. During treatment
28 sessions, Defendant lifted her sports bra such that he could see her breasts, and he touched her breast and

1 areola. Defendant also walked his fingers along her bare breast to place stim pads. Defendant also
2 touched Victim H's breasts while performing supposed massage-type therapy several times. During
3 other sessions, Defendant moved his hand from her hip down to her pelvic area and touched her pubic
4 area before placing a stim pad on her hip. Because Victim I received both "stim" and massage-type
5 treatment from Defendant, Victim I's testimony will corroborate testimony from the charged victims
6 regarding Defendant's use of multiple types of treatments as a pretext for his inappropriate conduct.
7 Victim I did not confront Defendant, but she felt uncomfortable, and eventually stopped going to
8 Defendant for treatment.

9 The Court has already determined that Victim I's testimony is admissible pursuant to Rule 413,
10 *see* Doc. 68 at page 14, and the United States currently expects to call Victim I as one of the four Rule
11 413 witnesses the Court has pre-authorized under Rule 403. *See* Doc. 68 at page 17.

12 **4. VICTIM K**

13 Victim K was a student-athlete on SJSU's women's swim team. During 2006-2007, Victim K
14 went to Defendant for treatment for shoulder and hip injuries. Defendant worked on her left shoulder and
15 then moved his hand down the sides of her left breast. Over time, he moved his hand across her chest
16 underneath her sports bra, grazed her nipples, and then massage her right breast. This occurred dozens of
17 times, and Defendant called it "pressure point therapy." When he conducted such treatment for her back
18 pain, Defendant moved her swimsuit to reveal her bikini line, and massaged along her groin and pubic
19 area, though he never touched her labia. Victim K can also corroborate anticipated testimony from
20 Victim Three that Defendant used terms such as "trigger point" and "pressure point" to describe his
21 techniques, which is relevant because most of the touching described by the victims is not consistent with
22 trigger/pressure point therapy.

23 The Court has already determined that Victim K's testimony is admissible pursuant to Rule 413,
24 *see* Doc. 68 at page 14, and the United States currently expects to call Victim K as one of the four Rule
25 413 witnesses the Court has pre-authorized under Rule 403. *See* Doc. 68 at page 17.

26 **5. Victim O**

27 Victim O was a student-athlete on SJSU's women's swim team. During 2009-2010, Victim O
28 went to Defendant for treatment for shoulder and hip injuries. During several sessions, Defendant put his

1 hands in her sports bra and touched her breasts.

2 The Court has already determined that Victim O's testimony is admissible pursuant to Rule 413,
3 *see* Doc. 68 at page 14. The United States respectfully submits that Victim O's testimony should also be
4 permitted under Rule 403 because, unlike the other members of the SJSU women's swim team that the
5 government intends to call under Rule 413, although she was a member of the women's swim team
6 (complaints from which resulted in an investigation of Defendant in 2009 and 2010), Victim O did not
7 discuss her contact with Defendant at length with other members of the team. Thus, Victim O's
8 testimony will rebut any implication that members of the team influenced each other's complaints.
9 Victim O can also describe second-guessing her own instincts that Defendant's treatment was improper
10 because she believed Defendant was more knowledgeable than she was, which would corroborate similar
11 anticipated testimony from Victims Three and Four. Finally, because Victim O saw Defendant for
12 treatment on several occasions during which he did not touch her inappropriately, she can corroborate
13 anticipated testimony from Victim Two that Defendant sometimes rendered treatment which did not
14 involve any inappropriate touching.

15 **6. Victim G**

16 Victim G was a student-athlete on SJSU's women's swim team. During 2008-2009, Victim G
17 went to Defendant for treatment for a shoulder injury. During several sessions, Defendant placed stim
18 pads inside her sports bra, close to her nipples, touching her breasts. Victim G did not confront
19 Defendant, but she felt uncomfortable, and she eventually told her coach about Defendant's misconduct.

20 The Court has already determined that Victim G's testimony is admissible pursuant to Rule 413,
21 *see* Doc. 68 at page 14. The United States respectfully submits that Victim G's testimony should also be
22 permitted under Rule 403 because, like Victims Two and Four, Victim G returned to Defendant for
23 treatment even after she had been assaulted. However, unlike any of the charged victims, Victim G did
24 report Defendant's conduct to relevant authorities. Thus, Victim G's testimony will illustrate the fact that
25 student-athletes recognized Defendant's conduct as improper, even if they returned for subsequent
26 treatment. And, unlike the four Rule 413 witnesses the Court has preauthorized under Rule 403, it is
27 anticipated that Victim G will describe feeling pressure to receive treatment from Defendant in order to
28 maintain a scholarship, which would corroborate similar anticipated testimony from Victim Three.

1 Because Victim G received treatment from athletic trainers other than Defendant, Victim G can also
2 corroborate anticipated testimony from Victims One and Two that Defendant's techniques were very
3 different from those of other athletic trainers. Finally, Defendant used the placement of stim pads as a
4 pretext for touching Victim G, similar to his conduct with respect to Victim Four.

5 **7. Victim P**

6 Victim P was a student-athlete on SJSU's women's swim team. During 2009, Victim P went to
7 Defendant for treatment for shoulder and hip injuries. During treatment sessions, Defendant put his
8 fingers down the sides of her sports bra, touching her breasts and nearly touching her nipple. When
9 treating her hip, although Defendant used a towel to cover her, Defendant put his hand under the towel
10 and massaged her bikini line directly.

11 The Court has already determined that Victim P's testimony is admissible pursuant to Rule 413,
12 *see* Doc. 68 at page 14. The United States respectfully submits that Victim P's testimony should also be
13 permitted under Rule 403 because, unlike several of the charged victims and Rule 413 witnesses, Victim
14 P has never been a plaintiff in a lawsuit against SJSU based on Defendant's conduct. Thus, Victim P's
15 testimony will rebut any implication that any other victim had a financial incentive to fabricate
16 allegations. Defendant also touched Victim P inappropriately on her upper body and her lower body
17 while treating two distinct injuries, and so Victim P can corroborate Victim Two's description of how
18 Defendant's inappropriate conduct changed depending on what injury he was purporting to treat. Finally,
19 because Victim P received treatment from athletic trainers other than Defendant, Victim P can also
20 corroborate anticipated testimony from Victims One and Two that Defendant's techniques were very
21 different from those of other athletic trainers.

22 **8. Victim N**

23 Victim N was a student-athlete on SJSU's women's swim team. During 2007-2009, Victim N
24 went to Defendant for treatment of shoulder injuries. During several sessions, Defendant placed his hand
25 in her sports bra and touched the top of her breast.

26 The Court has already determined that Victim N's testimony is admissible pursuant to Rule 413,
27 *see* Doc. 68 at page 14. The United States respectfully submits that Victim N's testimony should also be
28 permitted under Rule 403 because Victim N can corroborate anticipated testimony from Victims Two

1 and Three that Defendant touched student-athletes on parts of their body that were not related to their
2 injuries. Additionally, because Victim N received treatment from athletic trainers other than Defendant,
3 Victim N can also corroborate anticipated testimony from Victims One and Two that Defendant's
4 techniques were very different from those of other athletic trainers. Victim N can also corroborate
5 anticipated testimony from Victim Three that Defendant used terms such as "trigger point" and "pressure
6 point" to describe his techniques, which is relevant because most of the touching described by the victims
7 is not consistent with trigger/pressure point therapy. Finally, Victim N is unique among the
8 government's proposed Rule 413 witnesses in her ability to provide relevant testimony about how
9 Defendant's breast-touching progressed and increased over time, because Victim N is one of Defendant's
10 earliest victims and began seeing Defendant shortly after beginning her athletic career at SJSU.

11 CONCLUSION

12 The United States has reduced the number of Rule 413 witnesses it seeks permission to call at
13 trial from fifteen to eight. Each of the proposed Rule 413 witnesses corroborates different components of
14 the anticipated testimony from charged victims and helps to establish Defendant's pattern of conduct.
15 They will also rebut Defendant's likely defenses by providing circumstantial evidence of his state of
16 mind, and also by illustrating to the jury that individual victims' failure to object to Defendant's conduct
17 contemporaneously is not inconsistent with Defendant's guilt. Thus, the testimony of all eight of the
18 proposed Rule 413 witnesses is necessary to buttress different pieces of relevant evidence. In weighing
19 the *LeMay* factors, the probative value of the uncharged sexual assaults substantially outweighs any
20 danger of unfair prejudice, and any unfair prejudice can be mitigated through an appropriate limiting
21 instruction.

22 For the reasons set forth above, the United States respectfully requests that the Court admit
23 the evidence of Defendant's other acts of sexual assault, pursuant to Fed. R. Evid. 413.

24
25
26
27
28

Respectfully submitted,

THOMAS A. COLTHURST
Attorney for the United States

/s/ Michael G. Pitman
MICHAEL G. PITMAN
Assistant United States Attorney

KRISTEN CLARKE
Assistant Attorney General
Civil Rights Division

/s/ MarLa Duncan
MarLa Duncan
Trial Attorney
Criminal Section, Civil Rights Division

Attorneys for United States of America